

- DECISION -

Claimant:
MALAIKA L LESESNE

Decision No.: 159-BR-11

Date: January 12, 2011

Appeal No.: 1032344

S.S. No.:

Employer:
BALTIMORE CITY COMMNTY COLLEGE

L.O. No.: 63

Appellant: Claimant

Issue: Whether the claimant is unemployed between academic years or terms, or during a customary vacation period, from an educational institution and has reasonable assurance of returning to work within the meaning of MD Annotated Code, Labor and Employment Article, Title 8, Section 909.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: February 11, 2011

REVIEW ON THE RECORD

The Board adopts the hearing examiner's findings of fact except for the last paragraph (which comprises one sentence). The Board further finds the following findings of fact:

The claimant's Spring 2010 employment contract ended on April 19, 2010. No additional work was available for the claimant. The employer did not provide the claimant with reasonable assurance, either in writing or orally, that she would return to work for the next academic semester or term which was to begin in September 7, 2010.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*; *COMAR 09.32.06.04(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

Md. Code Ann., Lab. & Empl. Art., § 8-909 provides, in pertinent part:

(b) Educational institutions; services performed in instructional, research, or principal administrative capacity. --

(1) With respect to services performed in an instructional, research, or principal administrative capacity for an educational institution, benefits may not be paid based on those services for any week of unemployment that begins during:

- (i) a period between 2 successive academic years;
- (ii) a similar period between 2 regular but not successive terms; or
- (iii) a period of contractually provided paid sabbatical leave.

(2) This subsection applies only to any individual who:

(i) performs the services in an instructional, research, or principal administrative capacity in the first of 2 academic years or terms; and

(ii) has a contract or reasonable assurance that the individual will perform the services in an instructional, research, or principal administrative capacity for any educational institution in the second of the 2 academic years or terms.

* * * * *

(d) Educational institutions; services performed in instructional, research, or principal administrative capacity -- Vacations and holidays. --

(1) With respect to services described in subsections (b) and (c) of this section, an individual may not be eligible for benefits based on the services for any week that begins during an established and customary vacation period or holiday recess.

(2) This subsection applies to any individual who:

(i) performs the services in the period immediately before the vacation period or holiday recess; and

(ii) has a reasonable assurance that the individual will perform the services in the period immediately following the vacation period or holiday recess.

The legislative intent is clear from the plain language and statutory scheme as well as the legislative history; the General Assembly sought to deny unemployment benefits to school employees during scheduled and anticipated holidays, vacations, and breaks between academic terms when the employee has a reasonable assurance of continued employment. As one court has explained, "[t]he rationale for this limitation is that school employees can plan for those periods of unemployment and thus are not experiencing the suffering from unanticipated layoffs that the employment-security law was intended to alleviate." *Thomas v. DLLR*, 170 Md. App. 650, 665-66 (2006), citing Baker v. Dep't of Employment and Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994); See also *University of Toledo v. Heiny*, 30 Ohio St. 3d 143, 30 Ohio B. 454, 507 N.E.2d 1130, 1133 (Ohio 1987) (stating that the provisions of that state's unemployment compensation legislation, which allowed benefits to unemployed nonprofessional employees of educational institutions "whose employment prospects for the ensuing academic year are doubtful," "was not enacted to 'subsidize the vacation periods of those who know well in advance that they may be laid off for certain specified periods'" (quoting *Davis v. Commonwealth, Unemployment Compensation Board of Review*, 39 Pa. Commw. 146, 394 A.2d 1320, 1321 (Pa. 1978))).

Md. Code Ann., Lab. and Empl. Art., § 8-101(n) defines "educational institution" as "an institution that offers participants, students, or trainees an organized course of study or training that is academic, technical, trade-oriented, or preparatory for gainful employment in a recognized occupation," and includes "an institution of higher education." In contrast, § 8-909(e) defines "educational service agency" as "a governmental entity that is established and operated exclusively to provide educational services to one or more educational institutions."

To meet the "reasonable assurance" standard, an employer need not demonstrate that an employee is guaranteed the job in the next academic semester. Rather, the employer must establish that the employee has a reasonable expectation of being recalled to perform the same or similar services. *Wenner v. Frederick County Board of Education*, 42-BR-93.

In the instant case, the hearing examiner improperly allocated the burden of proof on the claimant. It was not the claimant's burden to prove that she "would NOT return to work for the Fall semester"; it was the employer's burden to demonstrate that it sufficiently provided the claimant reasonable assurance that she would return to perform the same or similar work for the Fall semester. The Board finds that the employer failed to meet its burden in this case.

The evidence clearly demonstrates that the employer provided the claimant no assurance whatsoever. When the hearing examiner asked the claimant if the employer asked her to return for the Fall semester, the claimant unequivocally answered, "No".

The employer, duly notified of the date, time and place of the hearing, failed to appear. The Board finds the claimant's testimony credible and un-refuted.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

DECISION

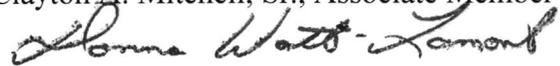
The Board holds based upon a preponderance of the credible evidence that the claimant did not have reasonable assurance of returning to the same or similar employment with an educational institution in the next academic year within the meaning of *Md. Code Ann., Lab. & Empl. Art., § 8-909*.

The claimant is eligible for unemployment insurance benefits based upon employment with this employer from the week beginning April 25, 2010, provided she meets the other requirements of the law.

The hearing examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

Copies mailed to:

MALAIKA L. LESESNE
BALTIMORE CITY COMMUNITY COLLEGE
SUSAN BASS DLLR
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

MALAIKA L LESESNE

SSN #

Claimant

vs.

BALTIMORE CITY COMMNTY COLLEGE

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1032344

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 30, 2010

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant is unemployed between academic years or terms, or during a customary vacation period, from an educational institution and has reasonable assurance of returning to work within the meaning of MD Annotated Code, Labor and Employment Article, Title 8, Section 909.

FINDINGS OF FACT

The employer in this case is an education institutional. The claimant began working for it on or about September 2009. The claimant last worked for it on or about April 19, 2010, corresponding to the last day of the Spring, 2010 semester.

The claimant was employed as an adjunct teacher, which is either an instructional, research or principal administrative position. The claimant was teaching in the employer's GED program. The program was offered in a local high school and following the high school academic year except that the GED program was for a shorter term than the local high school academic year. The claimant had worked for this employer from September 2009 to December 2009. In December, the employer asked the claimant to return as a teacher for the January 2010 through April 2010 term.

The next successive semester begins on September 7, 2010; the claimant had reasonable assurance of returning to work in the claimant's previous position at that time.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-909(b) provides:

(1) With respect to services performed in an instructional, research, or principal administrative capacity for an educational institution, benefits may not be paid based on these services for any week of unemployment that begins during:

- (i) a period between 2 successive academic years;
- (ii) a similar period between 2 regular but not successive terms; or
- (iii) a period of contractually provided paid sabbatical leave.

(2) This subsection applies only to an individual who:

(i) performs the service in an instructional, research, or principal administrative capacity in the first of 2 academic years or terms; and

(ii) has a contract or reasonable assurance that the individual will perform the services in an instructional, research, or principal administrative capacity for any educational institution in the second of the 2 academic years or terms.

To meet the "reasonable assurance" standard, an employer need not demonstrate that an employee is guaranteed the job in the next academic semester. Rather, the employer must establish that the employee has a reasonable expectation of being recalled to perform the same or similar service.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the facts on the credible evidence as determined by the Hearing Examiner.

It is clear and essentially undisputed that (a) the claimant was employed by an educational institution, (b) had unemployment that occurred between successive academic terms or years, and that (c) the employed was employed in a capacity covered by Section 8-909.

Although duly notified, the employer failed to be present at the hearing to present testimony in this matter. The claimant testified that at the end of her contract and the GED program in April 2010, the employer did not ask her to return for the next GED session. Reasonable assurance, while not a guarantee, requires a showing of reasonable expectation of return to employment. The Hearing Examiner finds that there was no evidence presented at the hearing that the claimant would NOT be return to work for the Fall semester. The claimant returned to work following the end of her prior contract with this employer and there was no evidence presented that the same would not happen for the Fall 2010 semester. Additionally, there was no evidence presented that the employer did not know or did not believe they would have a position available

for the claimant for the Fall 2010 semester. In fact, the claimant did have a position available for the claimant and the claimant declined the position because she had accepted other employment.

The Hearing Examiner holds that the claimant did have reasonable assurance of returning to work in the same capacity for the next academic term or year, benefits shall be denied pursuant to the requirements set forth in Section 8-909.

DECISION

IT IS HELD THAT the claimant has reasonable assurance of returning to the same or similar employment with an educational institution in the next academic year within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-909. The claimant is disqualified from receiving unemployment insurance benefits based upon employment with the above-identified employer from the week beginning April 25, 2010 and until the start of the successive academic year commencing with the week beginning September 4, 2010. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us, or call 410-949-0022 from the Baltimore region or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

However, the claimant may be eligible for unemployment insurance benefits under other covered employment, even though wages from the above employer may not be used to determine the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.

S. Smith, Esq.

S. Smith, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by October 15, 2010. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : September 23,2010
TH/Specialist ID: WCU4P
Seq No: 005
Copies mailed on September 30
, 2010 to:
MALAIKA L. LESESNE
BALTIMORE CITY COMMNTY COLLEGE
LOCAL OFFICE #63
SUSAN BASS DLLR